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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDGAR ADRIAN AGUILAR, Defendant and Appellant.	A156452 (Napa County Super. Ct. No. CR137324)

Appellant Edgar Aguilar contends the trial court abused its discretion by denying his Penal Code section 1016.5[1] motion to vacate his voluntary manslaughter conviction on the ground he received inadequate advisement of the immigration consequences of his plea. He submits that, in contravention of *People v. Patterson* (2017) 2 Cal.5th 885 (*Patterson*), the trial court erred in relying on the section 1016.5 advisement in his plea form to find he was properly informed of the adverse immigration consequences of his plea. We conclude the motion to vacate came too late. Because appellant failed to exercise reasonable diligence in bringing it, we shall affirm.

I. BACKGROUND

In an unpublished opinion resolving a prior appeal in this case, we summarized the case background and proceedings to that point as follows:

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

"According to the probation officer's report, on October 1, 2007, [appellant] and another young man became embroiled in a verbal altercation with three rival gang members that escalated into a fist fight. [Appellant] pulled out a knife he carried with him and stabbed one of the rival gang members, Manual Macias. Macias died from a single stab wound to his chest.

"[Appellant] was 15 years old at the time but charged as an adult. (Welf. & Inst. Code, § 707, subd. (d)(2)(A).) [He] was appointed legal counsel to represent him on October 3, 2007. On November 2, 2007, [appellant] was charged in a first amended complaint with murder (§ 187, subd. (a)), assault with a deadly weapon (§ 245, subd. (a)(1)), and street terrorism (§ 188.22, subd. (a)). Various sentence enhancements were alleged, including allegations that the murder and assault were committed in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).)

"In April 2009, [appellant] entered a negotiated disposition. The parties stipulated to adult court jurisdiction. [Appellant] pleaded no contest to voluntary manslaughter (§ 192, subd. (a)) in exchange for which the murder charge (§ 187, subd. (a)) and other charges were dismissed. [He] admitted that the crime was committed in association with a criminal street gang and with personal use of a deadly weapon. (§§ 186.22, subd. (b)(1)(C), 12022, subd. (b)(1).) When entering his plea, [he] waived his constitutional rights in writing and acknowledged that he would be sentenced to prison for a minimum term of 13 years and a maximum term of 22 years. [He] also acknowledged that his plea could result in deportation ([appellant] is a Mexican citizen) and that he was liable for restitution.

"In June 2009, the court sentenced [appellant] to 21 years in prison, as follows: the upper term of 11 years for manslaughter (§ 193, subd. (a)) and 10 years for gang participation (§ 186.22, subd. (b)(1)(C)). The court chose the upper term of punishment for manslaughter among three possible terms after considering facts relating to [appellant] and the crime. (§§ 193, subd. (a), 1170, subd. (b); Cal. Rules of Court, rule 4.420.) The court stayed punishment for the weapon enhancement[] (§ 12022,

subd. (b)(1)) [and] . . . ordered [appellant] to pay restitution of $8,510.95 to the victim's mother." (*People v. Aguilar* (Apr. 13, 2010, A125521) [nonpub. opn.].)

We affirmed the conviction in the ensuing appeal. (*People v. Aguilar, supra,* A125521.) More than nine years after his conviction, on December 27, 2018, appellant moved to vacate it on the ground the trial court did not properly advise him of the immigration consequences of his plea. (§1016.5.) The trial court denied his motion. Appellant appeals again, this time from the denial of his section 1016.5 motion to vacate.

II. DISCUSSION

Appellant argues the trial court erred in denying his motion to vacate on the ground that he was properly advised of the immigration consequences of his plea during sentencing. He contends the court found that trial counsel adequately advised him of the immigration consequences of his plea based on his signed plea form rather than evaluating appellant's subjective understanding as required by *Patterson*. We reject this argument. It fails because appellant waited more than nine years to file a motion to vacate.

Section 1016.5 requires the trial court to administer an advisement to the defendant, warning of possible adverse immigration consequences. (§ 1016.5, subd. (a).) If the trial court fails to provide the advisement, the defendant can move to vacate the judgment, withdraw his or her guilty plea, and enter a plea of not guilty. (§ 1016.5, subd. (b); *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1617 (*Castaneda*).) "In . . . section 1016.5, the Legislature explicitly acknowledged the motion to vacate the judgment as the appropriate vehicle to clear the way for a postjudgment withdrawal of a guilty or nolo contendere plea entered without advisement of the possible immigration consequences." (*Castaneda,* at p. 1617.)

But a defendant must bring his or her motion to vacate with "reasonable diligence." (*Castaneda, supra*, 37 Cal.App.4th at p. 1622.) "[T]he trial court may properly consider the defendant's delay in making his application, and if 'considerable time' has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay." (*Castaneda,* at p. 1618; accord, *People v.*

Totari (2003) 111 Cal.App.4th 1202, 1207 (*Totari II*).) A section 1016.5 motion "is timely if brought within a reasonable time after the conviction actually 'may have' " one or more of the specified immigration consequences. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 204.) Courts of appeal review a trial court's ruling on a section 1016.5 motion to vacate for abuse of discretion. (*People v. Arendtsz* (2016) 247 Cal.App.4th 613, 617–618, citing *Zamudio, supra*, at pp. 192, 199–200.)

Appellant claims he "seasonably" brought his motion to vacate. We cannot agree. By the time he moved to vacate his conviction, his plea was more than nine years old. He admits he first received warning of potential adverse immigration consequences at the California Youth Authority (now the Division of Juvenile Justice (DJJ)). Immigration officials "came to interview [appellant]" and informed him that he "had an immigration hold . . . ." Appellant does not provide the date that this conversation occurred, but he does state that officials again informed him as to the deportation consequences of his conviction when he transferred to the California Department of Corrections and Rehabilitation (CDCR). Appellant again does not provide the date that he received this information. He explains, "When I was transferred to adult prison, and *while I was being processed at reception*, I learned I was going to be deported as a result of my conviction . . . ." (Italics added.)

The reasonable inference is that appellant had ample notice and opportunity to file a motion to vacate his conviction. Appellant was 16 years old when convicted of voluntary manslaughter. Because minors are generally held in a juvenile facility until they turn 18 years old,[2] and appellant states he was held by the DJJ when he received the first warning about an immigration hold from the immigration officials, he likely received notice of the adverse immigration consequences of his conviction before he turned 18 years old on June 2, 2010. (Welf. & Inst. Code, § 1731.5, subd. (c)(3) ["The duration of the transfer [to the DJJ] shall extend until any of the following occurs: [¶] . . .

[2] In some cases, they can be detained until as old as age 25. (Welf. & Inst. Code, § 1731.5, subd. (c)(3).) If appellant had been in a juvenile facility that long, he could and should have said so by declaration in support of his motion.

(3) The inmate reaches 18 years of age."].) Appellant then received an explicit warning that "[he] was going to be deported as a result of his conviction" when he transferred to the CDCR. This likely occurred shortly after he turned 18 years old. (See *ibid*.) Appellant nonetheless waited until December 27, 2018, to seek vacatur of his conviction.

"Whether defendant knew of the potential immigration consequences, despite inadequate advisements at the time of the plea, may be a significant factor in determining prejudice or untimeliness." (*People v. Akhile* (2008) 167 Cal.App.4th 558, 565, citing *Zamudio, supra,* 23 Cal.4th at pp. 199, 207, 209–210.) Appellant fails "to allege with specificity 'the time and circumstances under which the facts were discovered' " that would permit the court to " 'determine as a matter of law whether [appellant] proceeded with due diligence.' " (*People v. Kim* (2009) 45 Cal.4th 1078, 1098–1099 [almost seven-year delay between the time the defendant first became aware of possible deportation and the filing of coram nobis petition was unreasonable].) Even if we were to credit appellant's claim that he learned of his immigration consequences when transferred to prison, he then took an additional eight years and six months, approximately, to bring his motion. By any measure, that cannot be considered reasonable diligence.

"The reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after a long delay." (*Castaneda, supra,* 37 Cal.App.4th at p. 1618; accord, *Totari II, supra,* 111 Cal.App.4th at p. 1207.) Appellant's lengthy delay in bringing this motion would prove detrimental to the People's case at trial. Before appellant pleaded no contest in 2009, the prosecution had incriminating witness statements from appellant's fellow participant, Jose H; bystanders; ex-girlfriend; mother; and a friend to whom appellant admitted responsibility for the murder, Freddy C. Those witnesses, as well as the officers who conducted the investigation, may now be unable or unwilling to testify as fully and accurately as they could have nine years ago.

As a result, we conclude the trial court's denial of appellant's section 1016.5 motion was proper. (*People v. Marquez* (1992) 1 Cal.4th 553, 578 ["the trial court's ruling must be upheld if there is any basis in the record to sustain it"].) Appellant insists

we must nonetheless reverse because, even though the People argued tardiness in its opposition to his section 1018 motion, and the parties presented a record that would have allowed the trial court to resolve the motion on that basis, the court chose instead to decide the motion on the merits, conspicuously omitting any reference to whether the motion was "seasonably made." He argues that "[w]here, as here, the trial court states its reasons for its discretionary ruling, the reviewing court must evaluate *those reasons*, not 'make up' others."

Appellant's suggestion that we eschew decision upon a ground not cited by the trial court flies in the face of one of the most fundamental rules of appellate procedure—that "[i]f the appealed judgment or order is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such basis was actually invoked." (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1201; see *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) This venerable rule applies in criminal practice just as surely as it does in civil practice. (E.g., *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1542.) Although there are a handful of exceptions to the rule—for example, where the trial court is *required* to state its reasons for a discretionary decision, which allows us to say its failure to do so amounts to a failure to exercise discretion—no such exception applies here.

III. DISPOSITION

The trial court's denial of appellant's section 1016.5 motion is affirmed.

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STREETER, J.

We concur:

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POLLAK, P.J.

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TUCHER, J.

A156452/*People v. Aguilar*